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In The
Supreme Court of the United States

October Term, 1970

NO. 966

DR. ROY F. MACK,

Petitioner,

v.

THE FLORIDA STATE BOARD OF DENTISTRY,

Respondent,
(Cross-Petitioner)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(CROSS PETITION)

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The Respondent, (Cross-Petitioner) Florida State Board of Dentistry, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on July 7, 1970.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, Dr. Roy F. Mack, Plaintiff-Appellee, v. The Florida State Board of Dentistry, Defendant-Appellant, not

yet reported is appended hereto (United States Fifth Circuit Number 28,083, July 7, 1970). The Order of the Court of Appeals denying Petition for Rehearing entered August 17, 1970 is not yet reported.

The opinion, decision and final judgment of the United States District Court for the Southern District of Florida entered March 20, 1969, Dr. Roy F. Mack, Plaintiff, v. Florida State Board of Dentistry, Defendant, 288 F.Supp. 1230 (1968). (Petition for Rehearing denied). Said opinion, decision and final judgment is appended to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 7, 1970. The Order denying the Petition for Rehearing was entered on August 17, 1970. The Mandate of the Court of Appeals was stayed at the request of Dr. Roy F. Mack, and this Petition for Writ of Certiorari (Cross-Petition) was filed within ninety days of August 17, 1970. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1) and United States Supreme Court Rule 19, 28 U.S.C.A.

QUESTIONS PRESENTED

I.

Whether the United States Court of Appeals for the Fifth Circuit assumed jurisdiction of a matter previously litigated in the State Courts of the State of Florida, including the Supreme Court of Florida, where said United States Court of Appeals for the Fifth Circuit had no jurisdiction to directly review a final determination of a federal constitutional question voluntarily submitted to and decided by the Supreme Court of Florida.

II.

Whether the United States District Court for the Southern District of Florida could assume jurisdiction in the first instance when it had no jurisdiction to review a final determination of a federal question voluntarily submitted to and decided by the Supreme Court of Florida.

III.

Whether the United States Court of Appeals for the Fifth Circuit did assume appellate jurisdiction over the highest Courts of the State of Florida, without authority or right in violation of this Court (Supreme Court of the United States), other Circuits of the United States Court of Appeals and even its own decisions when it stated in its opinion

> "This Court has made an independent examination of the transcript, 518 pages of the purported Hearing given Dr. Mack by the Dental Board on February 18, 1970." Emphasis supplied.

IV.

Whether the United States Court of Appeals for the Fifth Circuit can with no issue presented to it by the litigants, briefed, argued or otherwise, assume appellate jurisdiction over the highest Courts in the State of Florida and make an independent examination of a transcript and testimony already reviewed by the Courts of the State of Florida and render an opinion and decision contrary to that of the State Court that reviewed the same record (transcript).

STATUTORY PROVISIONS IN CASE

This case originally involved a violation of the Florida Statutes governing the conduct of a licensed dentist practicing in

the State of Florida. Said licensed dentist, Dr. Roy F. Mack, being charged with a violation of Florida Statutes, 1965, Sections 466.24 (3) (a) (f) (g) (h) (l) (n), 466.27 (5) and 466.36:

> "466.24 (3) Has been guilty of: (a) Misconduct either in his business or in his personal affairs which would bring discredit upon the dental profession; (f) Publication or circulation, directly or indirectly of any fraudulent, false or misleading statements as to the skill or methods of practice of any person; (g) Advertising in any manner his professional services in the practice of dentistry or the cost or fees therefor in this state in a manner not expressly authorized by this chapter; claiming or inferring of professional superiority over other practitioners; (h) Employing or using a solicitor or other agent to obtain patronage; (l) Failure to maintain reasonably sanitary facilities and conditions; and (n) Violating any other provision of this chapter regulating the practice of dentistry or dental hygiene.
> 466.27 (5) Telephone listings shall be confined to the local telephone directories. Such listings shall be limited to the dentist's name, title, dental degree, D.D.S. or D.M.D., using the abbreviation only, any specialty to which the dentist confines his practice exclusively, office location, residence and office telephone numbers, residence address and many include his membership in a local dental society if in accord with local customs.
> 466.36 PRACTICING DENTISTRY UNDER ASSUMED NAME: PENALTIES.--On and after the passage of this chapter, it shall be unlawful for any person or persons to practice or offer to practice dentistry under any name except his or her own proper name, which shall be the name used in his or her license certificate granted to him or her as a dentist as

provided in this chapter, and unlawful to use the name of any company, association, corporation, clinic, trade name, or business name in connection with the practice of dentistry as defined in this chapter, provided, nothing herein contained shall be so construed as to prevent two or more licensed dentists from associating together for the practice of dentistry, each in his or her own proper name. The violation of any of the provisions of this section by any dentist shall subject such dentist to suspension or revocation of his or her license."

STATEMENT OF CASE

The Respondent (Cross-Petitioner), Florida State Board of Dentistry, is a regulatory agency established by the Legislature of the State of Florida (Chapter 466 of the Florida Statutes) for the purpose inter alia of conducting hearings on proceedings to revoke or suspend a license when evidence has been presented showing violations of the aforesaid statute.

The Petitioner, Dr. Roy F. Mack, was a licensed dentist authorized to practice dentistry in the State of Florida prior to the revocation of his license by the defendant Board effective on April 1st, 1966.

Dr. Roy F. Mack's license to practice dentistry had been suspended on a previous occasion in 1962.

In 1966, Dr. Mack in accordance with the Florida Statutes was charged with a violation of the Florida Statutes pertaining to the practice of dentistry and an Administrative Hearing was had on February 18, 1966, having been continued from January 7, 1966.

The Hearing resulted in a finding of guilty to the charge

of violating the Florida Statutes pertaining to the practice of dentistry, and the Florida State Board of Dentistry revoked Dr. Roy F. Mack's license to practice dentistry effective April 1, 1966.

In due course, Dr. Mack's Petition to the District Court of Appeals, Third District, State of Florida, for a Writ of Certiorari was denied (*Mack v. Pepper*, 192 So. 2d 66).

The District Court of Appeals, Third District, State of Florida, in its opinion said:

> "in his brief, petitioner has presented two points. *The first point urges that the procedure before the Dental Board was such that he was deprived of a fair and impartial trial. The second point urges that the Board's findings are not supported by substantial competent evidence. We have reviewed the record in the light of these charges,* and we find that the first point is without merit. See State ex rel. Williams v. Whitman, 116 Fla. 196, 150 So. 136, 156 So. 705, 95 A.L.R. 1416 (1934); Florida Board of Pharmacy v. Levin, Fla. 1966, 192 So. 2d 14 (filed October 12, 1966). The second point is also without merit. *A review of the record reveals evidence to support the finding of the Board* under the rules laid down in De Groot v. Sheffield, Fla. 1957, 95 So.2d 912 and Florida State Board of Dental Examiners v. Feinglass, Fla.App. 1964, 166 So.2d 666."
>
> (Emphasis supplied)
>
> (Complete opinion appended)

The District Court of Appeals, Third District, State of Florida, then quoted from one of the opinions cited, i.e., Florida Board of Pharmacy v. Levin, supra, in some detail.

A Petition for Rehearing was denied and thereupon Dr. Roy F. Mack petitioned for Writ of Certiorari to the Supreme Court of Florida to review the ruling of the District Court, and this was denied (Mack v. Pepper, 201 So.2d 551). His Petition for Rehearing in the Supreme Court of Florida was denied on June 5, 1967.

Dr. Roy F. Mack did not petition this Court (Supreme Court of the United States) for Writ of Certiorari.

Dr. Mack filed suit in the United States District Court for the Southern District of Florida (approximately six months after the Supreme Court of Florida's denial of his Petition for Rehearing). Dr. Mack relied primarily upon jurisdiction under the Fourteenth Amendment to the Federal Constitution. The United States District Court for the Southern District of Florida *found that the Board applied the appropriate test of evidence* but held that the mixing of functions by the Dental Board constituted a deprivation of due process under the Fourteenth Amendment and ordered a Rehearing.

The Florida State Board of Dentistry appealed the decision of the United States District Court for the Southern District of the State of Florida and presented the question concerning whether or not the findings of the United States States District Court for the Southern District of Florida constituted a denial of due process of law and whether the so-called mixing of functions of the Board was improper and a denial of due process of law and contravention of the Fourteenth Amendment.

Dr. Roy F. Mack cross-appealed from the decision of the United States District Court for the Southern District of Florida on the standard of proof required in administrative proceedings i.e., requiring proof "beyond a reasonable doubt".

and that the Court should not have ordered a Rehearing, but merely returned Dr. Mack's license. Counsel for the respective parties briefed the case on these contentions and further, the Florida State Board of Dentistry appropriately raised the question of jurisdiction of the United States District Court for the Southern District of Florida and the jurisdiction of the United States Court of Appeals for the Fifth Circuit based primarily upon two recent decisions of the United States Court of Appeals for the Fifth Circuit and cited therein opinions of other Circuits of the United States Court of Appeals. Said cases being:

> *Paul v. Dade County, Florida*, 419 F.2d 10 (5 Cir. 1969) and *Brown v. Chastain*, 416 F.2d 1012 (5 Cir. 1969).

In oral argument, the United States Court of Appeals for the Fifth Circuit was primarily interested in argument concerning the question of jurisdiction and argument upon the merits was very limited and no argument, consideration or mention was made at the time of the oral argument concerning the transcript of the Board Hearing and neither was said matter presented to the Court or in any way briefed or argued by the parties.

To the contrary, the pre-trial stipulation entered into by counsel for the respective parties in the United States District Court for the Southern District of Florida stated that the Plaintiff (Dr. Roy F. Mack) received due and proper notice of the holding of said Hearing and was represented by counsel thereat and that Dr. Roy F. Mack was given an opportunity (through his counsel as mentioned above) to cross-examine the witnesses for the Board and to present his own testimony and that of his own witnesses.

This pre-trial stipulation was included in the records in the United States Court of Appeals for the Fifth Circuit on page 254 thereof and was set forth by the Florida State Board of Dentistry (Appellant below) on page 6 of their brief (and appendix of appellant in said Court). The matter of the stipulation in the record was brought to the attention of the United States Court of Appeals for the Fifth Circuit. (Petition for Rehearing of Appellant, The Florida State Board of Dentistry, filed July 20, 1970.)

The United States Court of Appeals for the Fifth Circuit in its opinion said

> "This Court has made an independent examination of the transcript, 518 pages, of the purported Hearing given Dr. Mack by the Dental Board on February 18, 1969."

and then proceeded to analyze portions of the transcript which had not been briefed or presented to that Court in any issue.

The issue of a fair and impartial Hearing had been decided in the District Court of Appeals, Third District, State of Florida, however, and Dr. Mack, speaking through his attorney on page 3 of his brief in the United States Court of Appeals for the Fifth Circuit directed to the Appellant (Florida State Board of Dentistry) Motion to Reverse the lower Court solely on the basis of jurisdiction said

> "The Board has attached to its Motion (on jurisdiction) Mack's brief of Petitioner before the Fifth Circuit Court of Appeals. While it is true that the brief raised the contention that the trial before the Board was not 'fair and impartial' under the State and Federal Constitution, a fair reading of the brief shows that

> the basis of this contention was *the conduct of the hearing* . . . . ." (Emphasis supplied)

Without arguing the Petition at this point, the Court's attention is invited to the very heart of this matter, that the Trial Court, the United States District Court for the Southern District of Florida lacked jurisdiction; that the United States Court of Appeals for the Fifth Circuit refused to rule on the question of federal jurisdiction. The United States Court of Appeals for the Fifth Circuit compounded the jurisdictional errors of both Courts by assuming appellate jurisdiction over State Courts when this Court (Supreme Court of the United States) has clearly stated that it does not possess such appellate jurisdiction. *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923).

REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Fifth Circuit did not have jurisdiction of this case and the United States District Court for the Southern District of Florida in the first instance did not have jurisdiction.

As to the decisional law, it is submitted that the opinion of the United States Court of Appeals for the Fifth Circuit not only conflicts with decisions of the Courts of Appeal from other districts, but that it further conflicts with applicable decisions of this Court (Supreme Court of the United States) and even with its own decisions and those of its Judges.

The very recent 3-judge federal court decision in the case of *William E. Davis v. Tom Adams*, decided by the United States District Court for the Northern District of Florida, No.

TCA-1615 (July 16, 1976) is cited to this Court as it succinctly sets forth the law and the federal decision both of the federal district court, the federal court of appeals and the United States Supreme Court, when the case was dismissed for want of jurisdiction and the 3-judge federal court said:

> ". . . . This Court has no jurisdiction to directly review a final determination of federal constitutional questions voluntarily submitted to and decided by the Supreme Court of Florida in connection with litigation pending in that Court, regardless whether review by the United States Supreme Court has been sought. *Eitel v. Faircloth*, 311 F.Supp. 1160 (S.D. Fla. 1970), *Paul v. Dade County, Florida*, 419 F.2d 10 (5 Cir. 1969), *Brown v. Chastain*, 416 F.2d 1012 (5 Cir. 1969) . . . .
>
> Moreover, res judicata principles are applicable here.* Plaintiff voluntarily submitted to the highest court in Florida his federal constitutional claims and suffered an adverse ruling on them from that court. His First Amendment claim could have been there presented.

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*See *E. B. Elliott Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141 (1970), wherein Judge Lewis R. Morgan, Circuit Judge Fifth Circuit, said:

> "Under the doctrine of *res judicata*, a prior judgment on the merits rendered by a state court of competent jurisdiction operates as a bar to a subsequent adjudication of the same cause of action, in substance rather than form, between the same parties or their privies in federal court, not only as to every matter which was offered and received to sustain or defeat the claim, but *as to every other matter which might with propriety have been litigated and determined in that action, regardless of whether questions of federal or state law are involved.* Acree v. Air Line Pilots Association, 5 Cir. 1968, 390 F.2d 199, cert. den. 393 U.S. 852, 89 S.Ct. 88, 21 L.Ed.2d 122; Hudson v. Lewis, 5 Cir. 1951, 188 F.2d 679; Iselin v. C. W. Hunter Co., 5 Cir. 1949, 173 F.2d 388; Jarrard v. Southeastern Shipbuilding Corporation, 5 Cir. 1947, 163 F.2d 960; Thompson v. Houston Oil Co., 5 Cir. 1930, 37 F.2d 687. 28 U.S.C. § 1738 (1948)." (Footnote and Emphasis supplied)

> That, through oversight or for other reason, he did not do so, gives him no right to bring it to this Court, either alone or with the other federal constitutional questions he presented to that court, seeking, in effect, review by this Court of the decision by the Supreme Court of Florida that the Act is constitutional against the attack he made on it, and insofar as he is concerned. *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932), *Norwood v. Parenteau*, 228 F.2d 148 (8 Cir. 1955), *Anderson v. Meisser*, 285 F.Supp. 974 (E.D. N.Y. 1968), *Deane Hill Country Club Inc. v. City of Knoxville*, 379 F.2d 321 (6 Cir. 1967) (citing England), *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470 (1930).

The Court's attention is invited to the fact that the Honorable Bryan Simpson, U.S. Circuit Judge, Fifth Circuit, sat on this 3-judge federal court.

Extracted from that was the case of *Eitel v. Faircloth*, 311 F.Supp. 1160 (S.D. Fla.)

The Honorable David W. Dyer, Circuit Judge (5th Circuit), and District Judges, Ted Cabot and Charles B. Fulton, said:

> ". . . . The Fifth Circuit Court of Appeals has recently had the opportunity to consider this precise issue, and *its resolution is well settled*. In Brown v. Chastain, 5 Cir. 1969, 416 F.2d 1012 the Court held at pages 1013-1014; . . . ." (Emphasis supplied)

The later decision of the United States Court of Appeals for the Fifth Circuit *in Paul v. Dade County, Florida*, 419 F.2d 10 at page 12, the Fifth Circuit Court said

> "However, it appeared during the course of the appeal

> that plaintiff Paul had previously litigated the same questions in the Florida state courts that he raises in the complaint in the instant case. We recently held in Brown v. Chastain, 5 Cir. 1969, 416 F.2d 1012 that a federal district court has no jurisdiction to determine constitutional issues already submitted to and determined by a state court. In accordance with our duty to raise the question of lack of federal jurisdiction at any time it appears, whether in the trial or appellate stage, we requested briefs on our own motion on the issue whether federal district court jurisdiction was foreclosed by virtue of the prior state action Lowry v. International Brotherhood of Boilermakers, etc., 5 Cir. 1958, 259 F.2d 568; see Voracheck v. United States, 8 Cir. 1964, 337 F.2d 797; Rock Island Millwork Company v. Hedges-Gough Lumber Company, 8 Cir. 1964, 337 F.2d 24."

The case of *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321, from the United States Court of Appeals for the Sixth Circuit stands for the proposition that

> ". . . . State courts are competent to decide questions arising under the federal constitution, and federal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts. See Grubb v. Public Utilities Comm., supra; Lavasek v. White, 339 F.2d 861 (10th Cir. 1964); Chirillo v. Lehman, 38 F.Supp. 65 (S.D. N.Y. 1940), aff'd, 312 U.S. 662, 61 S.Ct. 741, 85 L.Ed. 1108 (1941). Cf. Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947); Tomiyasu v. Golden, 358 F.2d 651 (9th Cir. 1966) . . . ."

The United States Court of Appeals for the Fifth Circuit should have directed the United States District Court for the Southern District of Florida to dismiss the case of Dr. Roy F. Mack.

2. The United States Court of Appeals for the Fifth Circuit, without authority or right, did assume appellate jurisdiction over the highest courts of the state of Florida and without having the issue it purportedly decided presented to it.

The United States Court of Appeals for the Fifth Circuit in its opinion dated July 7, 1970 makes it abundantly clear that it is making its decision on "an independent examination of the transcript" and by doing so it clearly had no jurisdiction to review a matter voluntarily submitted to and decided by the Courts of the State of Florida,* including the Supreme Court of Florida, and that the Federal Courts most assuredly do not provide a forum in which disgruntled parties can relitigate claims which have been presented to and decided by State Courts and further this Court has said and has been quoted repeatedly saying that Federal District Courts and Federal Courts of Appeal do not possess federal appellate jurisdiction over State Courts. (See *Deane Hill Country Club, Inc. v. City of Knoxville*, supra).

In addition to the cases already cited from other Circuits, a case arising in the Federal Court in Pennsylvania stands for the proposition that the Federal District Court in Pennsylvania did not have jurisdiction of suit to vacate order of Pennsylvania Supreme Court reversing judgment of Pennsylvania trial court and entering judgment notwithstanding ver-

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* See Mack v. Pepper (Florida State Board of Dentistry) 192 So.2d 66, when the State Court said "a review of the record reveals evidence to support the findings of the Board". Cert. denied 201 So.2d 551.

dict of jury for defendant, whether the suit be treated as an original action in the District Court or an action to review the Pennsylvania Supreme Court. 28 U.S.C.A. §§1331, 1338; U.S.C.A. Const. Amend. 14 - Wood v. Conneaut Lake Park, Inc., 258 F.Supp. 777, affirmed 366 F.2d 121, certiorari denied 88 S.Ct. 1660, 391 U.S. 907, 20 L.Ed. 2d 422.

In the case of *Brooks v. State of Texas*, 258 F.Supp. 807, reversed 381 F.2d 619, correcting a federal district court when it held that the United States Court may not step into the shoes of the state court as it were and do what it believes state judges ought to have done.

The Courts of the State of Florida had previously reviewed the record and transcript and found it to comply with the law and rules of evidence and contained competent substantial evidence and the United States Court of Appeals for the Fifth Circuit could not act as an appellate review court and step in and say that an independent examination of the transcript to them was bad because of the argument of counsel.

In *Williamson v. Puerifoy*, 316 F.2d 774, the Court held that the federal district court had no jurisdiction to correct ruling in suit in Texas District court or to instruct Texas judge how case should be tried.

There can not be found one case to support the proposition that the United States Court of Appeals for the Fifth Circuit or the United States District Court for the Southern District of Florida can exercise appellate jurisdiction over a State Court but there are so many decisions too numerous to cite all of them holding to the contrary, i.e., Federal District Courts and Federal Circuit Courts do not have appellate jurisdiction over State Courts.

The United States Court of Appeals for the Fifth Circuit

compounded the error of that court in not directing the United States District Court for the Southern District of Florida to dismiss Dr. Mack's case for want of jurisdiction and then considering issues not raised by the parties or in any way briefed or argued by them.

The error of the Court was additionally amplified by the facts as set forth in the Statement of Case that the parties (Dr. Mack and the Florida State Board of Dentistry) had entered into a pre-trial stipulation before the United States District Court for the Southern District of Florida where it *was agreed by the parties that Dr. Roy F. Mack had received due notice, was represented by counsel, was permitted to and did cross-examine witnesses for the Board and was allowed to and did present witnesses and testimony on his own behalf, including himself.*

No where can it be found in the records before the United States District Court for the Southern District of Florida or the United States Court of Appeals for the Fifth Circuit that any issue was raised as to the fact that there was not competent substantial evidence presented to the Board and that upon this evidence the Board made its decision. The Third District Court of Appeals made findings that this was true and the Fifth Circuit Court did on its own without authority, without right and in contravention of the laws of the United States, its own decisions, the decisions of other circuits and of this Court (Supreme Court of the United States) order a Rehearing.

In so doing, the Fifth Circuit Court of Appeals departed from the accepted and usual course of judicial procedure (ignoring its own decisions which have since been quoted by said Court and its judges) and thereby further sanctioned such departure by a lower court.

CONCLUSION

The United States District Court for the Southern District of Florida had no jurisdiction in the first instance to hear this case. The United States Circuit Court of Appeals for the Fifth Circuit likewise had no jurisdiction to hear this case, except to direct the United States District Court for the Southern District of Florida to dismiss the Plaintiff below (Dr. Roy F. Mack's) Complaint. This is abundantly clear from all of the cases both from the Fifth Circuit Court of Appeals, every other reported Circuit Court of Appeals case and every reported case arising out of the Supreme Court of the United States.

The United States Circuit Court of Appeals for the Fifth Circuit clearly had no authority to enter into a expedition entitled an independent examination of the transcript and could exercise no appellate jurisdiction over the highest state courts of Florida, and if Dr. Roy F. Mack had wanted an appropriate review of his case, he should have petitioned the Supreme Court of the United States for certiorari rather than filing a suit in the federal district court.

Unless this court grants this petition of certiorari for the reasons set forth herein and reverses the judgment and opinion of the Circuit Court of Appeals for the Fifth Circuit, the Supreme Court of the United States will be condoning and allowing a novel and dangerous precedent into the federal law by allowing appellate jurisdiction over state courts by federal district courts and federal circuit courts. This precedent would allow every federal district judge and/or circuit judge to review every transcript of every proceeding already resolved by the state's highest court even when said ques-

tions have not been presented in any manner. Nothing but chaos can result if such incorrect precedent is allowed to stand.

Respectfully submitted,

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PROOF OF SERVICE

I, RICHARD L. RANDLE, one of the attorneys for The Florida State Board of Dentistry, Respondent (Cross-Petitioner) herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of November, A.D., 1970, I served three copies of the foregoing Petition for Certiorari (Cross-Petition) on Alan R. Schwartz, Esquire, of Horton and Schwartz, Attorneys for Petitioner, by mailing said copies in a duly addressed envelope, with air mail postage prepaid.

.....

Attorney

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28085

DR. ROY F. MACK,

Plaintiff-Appellee,

versus

THE FLORIDA STATE BOARD OF DENTISTRY,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(July 7, 1970)

Before BELL, COLEMAN, and AINSWORTH, Circuit Judges.

COLEMAN, Circuit Judge: Upon complaint, notice, and hearing the Florida State Board of Dentistry revoked the license of Dr. Roy F. Mack to practice in that State. Without filing any specific findings of fact, the Board held Dr. Mack to have been guilty of causing in the yellow pages of the Greater Miami Telephone Directory a listing for Palm Springs General Hospital with his private number, of advertising professional services at a greatly reduced cost to certain mem-

bers of trade unions, and of taking improper personal liberties with female patients which would bring discredit upon the dental profession.

Dr. Mack first obtained review of the proceedings by the Fourth Florida District Court of Appeals. He argued that the procedure before the Dental Board was such that he was deprived of a fair and impartial hearing and that the Board's findings were not supported by substantial competent evidence. The Florida Court of Appeals, with no discussion of the events at the "hearing" held these contentions to be without merit and denied relief, 192 So.2d 66 (1966). The Supreme Court of Florida denied certiorari without written opinion.

Dr. Mack then filed an original suit in the United States District Court for the Southern District of Florida under the Civil Rights Act of 1871, 42 U.S.C.A., §1983, and the Fourteenth Amendment to the Federal Constitution, seeking the restoration of his license.

The opinion of the District Court disposing of the case is published, 296 F. Supp. 1259 (1968).

There is no point in paraphrasing the opinion here. Suffice it to say, the District Court decided two questions.

First, it held that the Board in proceeding to revoke a professional license was not limited to evidence beyond a reasonable doubt. With this we definitely agree, see 296 F. Supp. at 1262.

Second, the District Court held that "the mixing of functions of the Dental Board [investigating complaints, weighing

the reports, filing charges, holding hearings, and deciding the merits (with its attorney conducting the "prosecution")] constituted a deprivation of procedural due process in contravention of the Fourteenth Amendment. For the reasons hereinafter set forth we modify the decision of the District Court on the question and do not decide issues not necessary to the decision of the controversy.

This Court has made an independent examination of the transcript [518 pages] of the purported hearing given Dr. Mack by the Dental Board on February 18, 1966. The hearing began at 9 o'clock in the morning and concluded at 11:35 o'clock that night. The Board declined to continue the hearings into the next day or to adjourn to some other day because that would inconvenience its members. It declined to leave the record open to allow the testimony of a prominent medical doctor who was temporarily absent in Atlanta. It declined to leave the record open to allow an examination by a urologist to determine whether Dr. Mack was impotent, which had become the paramount issue in the hearing.

The dentist who presided over the hearing frankly stated that he was not a lawyer and was unfamiliar with the rules of evidence. This ordinarily would be of no particular moment, but Dr. Mack was represented by counsel and dozens of evidentiary questions arose. The chairman sustained at least ninety per cent of objections raised by its attorney, many times erroneously. He over-ruled about the same proportion of objections from Dr. Mack's counsel, often erroneously.

Dr. James Chimerakis, a licensed osteopathic physician, testified that he had examined Dr. Mack and found him to be impotent as the result of a rare disease. He produced

x-rays of Dr. Mack which he had taken and which his assistant had developed. He said he knew of his own knowledge that the x-rays were of Dr. Mack. The Board excluded them because the written identification appeared on the envelope rather than on the film. The Board said the envelope might have been switched.

Most seriously of all, from the beginning of the "hearing" until its bitter end, one of the attorneys for the Board and one of the attorneys for Dr. Mack indulged in continuous personal acrimony, charges and counter charges, attacking each other with unconcealed venom, both as to their personal attributes and their professional competency. An experienced judge would have nipped this in the bud and, if continued, these attorneys would no doubt have swiftly found themselves the objects of discipline. The chairman, of course, did not know how to cope with this and made a very feeble effort to do so. It is no excuse to say that it was provoked by either side.

To get down to brass tacks, this was not a hearing. It was an ungoverned confrontation. We hold that Dr. Mack, as a matter of fact, has not had a hearing in that sense required of anything which claims to be an administrative hearing as known to the jurisprudence of this Country.

In so holding, we imply no affirmative criticism of the Board Members. They were not lawyers. Their mistake was in not selecting some competent attorney as a presiding officer, preferably acceptable to both sides, who could have kept the hearing within due bounds while the Board Members heard the evidence.

We do not intimate that such a procedure is Constitutionally required. We suggest it only as one way by which this situation may be avoided a second time around. Neither do we insinuate that administrative hearings must be conducted with all the formalities and strictures of a criminal case. They do not. A man who is about to lose a professional license which he has held for twenty years, however, is entitled to develop his defense in freedom from what took place in this case.

The judgment of the District Court will be affirmed on the sole ground that Dr. Mack has not had a hearing on the charges preferred against him. The case will be remanded to the District Court so that the Florida State Dental Board may, if it wishes, conduct a lawful hearing within not more than sixty days after the receipt of our mandate in the District Court.

We indicate no view of the merits of this case. On the record as a whole it is seen that there was probable cause for the bringing of the charges. We hold, therefore, that a suspension of the license pending a hearing is neither unjust nor inequitable. The license will remain suspended as ordered by the District Court until a hearing can be held or until the expiration of the sixty day period as herein provided.

The District Court will give no directions to the Florida State Dental Board as to the modus operandi of its hearing. That is the responsibility of the Board and a duty for it to discharge, within the requirements of the Constitution.

As to a hearing for Dr. Mack, the standard of proof required, and the suspension of the dental license pending a

hearing, as hereinabove set forth, the judgment of the District Court is affirmed.

In all other particulars, the judgment of the District Court is vacated.

The case will be remanded for further proceedings not inconsistent herewith.

AFFIRMED in part, and in part VACATED, and REMANDED.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29085

DR. ROY F. MACK,

Plaintiff-Appellee,

versus

THE FLORIDA STATE BOARD OF DENTISTRY,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(August 17, 1970)

Before BELL, COLEMAN, and AINSWORTH, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Dr. Roy F. MACK, Plaintiff

v.

The FLORIDA STATE BOARD OF DENTISTRY, Defendant.

No. 67-1344-Civ.

United States District Court
S. D. Florida.
March 20, 1969.

296 F.Supp. 1250

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT

This cause came on for hearing before the Court sitting without a jury. After having considered the testimony and the proofs submitted, the file, and the advices of counsel, and being otherwise duly advised in the premises, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

This is a civil rights suit brought by a dentist whose license was revoked by the defendant. The action is brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Fourteenth Amendment of the Federal Constitution. The Court has jurisdiction both under the Federal Question Statute, 28 U.S.C. § 1331, (the Court finding that the value of the nature of the right sought to be protected is in excess of $10,000.00 exclusive of interest and costs), and under the Civil Rights Jurisdiction Statute, 28 U.S.C. 1343(4).

Prior to April 1, 1966, plaintiff was a licensed practicing dentist in the Southern District of Florida. The defendant Florida State Board of Dentistry (the Board), formerly known as the Florida State Board of Dental Examiners, exists under Florida Statutes, Chapter 466, as a regulatory and disciplinary agency for the practice of dentistry in the State of

Florida. As such, the Board's actions complained of in the instant suit were done under color of state law. Accordingly, any action by the Board was state action so as to raise the questions under the Fourteenth Amendment and the Civil Rights Act.

In the Fall of 1965 certain complaints concerning plaintiff's practice were received by the Board through its Executive Secretary, then a Dr. Robert M. Denton. At a Board meeting held in Homosassa Springs, Florida, on October 2, 1965, Dr. Denton reported to the Board the fact of and nature of the complaints received concerning the plaintiff. Following the receipt of this information, the Board, apparently pursuant to its Rule 3.02, authorized Dr. Denton to more fully investigate the charges through the use of one Thor Behrans, a Miami private detective. During the progress of the investigation some or all the members of the Board were kept "well apprised" of its progress, as were Dr. Denton and Mr. Richard Randle, attorney for the Board. In fact, Dr. Denton made one trip to Miami to personally interview some of the witnesses.

The results of the investigation were made known to the Board under the authority of its Rule 3.03(a) and in late 1965, based on the investigation reports, the Board authorized the filing of an accusation against plaintiff, charging improper advertising of his name and services and misconduct which would bring discredit upon the dental profession. The accusation, which is in the nature of an indictment or information, was sworn to by Dr. Denton and then circulated to members of the Board who authorized holding of a hearing. This procedure follows Rule 3.05(a), (c). The hearing was originally set for January, 1966, but because of some technical problems it was required to be re-set and was held on February 18, 1966.

During the pre-hearing stages of the case, Dr. Mack was represented by counsel who filed certain motions with the Board which were referred to Mr. Randle for disposal. Mr. Randle stated that the motions had been, at least in most respects, denied. It is unclear from the record whether this was an independent determination on the part of Mr. Randle or was delegated to him by the Board itself. In any event, at the hearing the Board apparently delegated to Mr. Randle and Dr. Denton the decisions concerning whether counsel could have access to the documents called for by the motions. While the hearing was purportedly an adversary proceeding, in effect Mr. Randle, the prosecutor, was acting on behalf of the Board both in prosecuting and in rendering legal advice. Mr. Randle sat with the members of the Board behind a table facing the accused. He often conferred with the Chairman concerning rulings out of the hearing of the court reporter or defense counsel. Prior to the hearing he had prepared a "format" for the Chairman, the contents or existence of which were unknown to opposing counsel. He was present during executive sessions taken by the Board to consider rulings concerning the trial. Although the Board purported to make independent rulings concerning evidentiary matters, some of which were of great importance at the trial, the record reveals that the Board, none of whom are lawyers, relied upon Randle to guide it in legal and evidentiary matters. As Dr. Farver, a Board members, candidly stated, "Well, we have to rely on him for legal aid and we believe what he says. So, if he does not want to admit it, fine."

In sum, both under the rules of the Board, 3.06(a), and Mr. Randle's practice, his function was that of "assisting the Board" in prosecuting the accused.

At the conclusion of the hearing the Board adjourned until

the following morning. At that time they met in executive session to consider the evidence and make a determination of guilt or innocence and to determine the punishment, if any. Both Dr. Denton and Mr. Randle were present during the course of the executive session. The plaintiff was found guilty and his license to practice dentistry was revoked. Mr. Randle was authorized to and did prepare the formal findings which merely track the accusation previously filed. It is stipulated between the parties that the standard of proof used by the Board was less than the so-called reasonable doubt test as employed in criminal trials.

The plaintiff attempted unsuccessfully to overturn the revocation in the state courts, *Mack v. Pepper*, 192 So.2d 66 (Fla. 3d Dist. 1966), *cert.* denied, 201 So.2d 551 (Fla. 1967). Thereupon, this petition was filed.

There are two questions to be decided by the Court, although discussed by defendant under four subdivisions. They are: (1) whether the Board, in proceedings to revoke a professional license such as this, is required to use the reasonable doubt test, and (2) whether the mixing of functions outlined in the foregoing resulted in a deprivation of plaintiff's rights to procedural due process. It should be pointed out that the plaintiff does not complain here of a denial of proper notice, or counsel, or the right to confrontation and cross-examination. The scope of this review, insofar as the second question is concerned, is strictly limited to the constitutional propriety of the mixing of functions, as here outlined.

With respect to the standard of proof argument raised by plaintiff under the first question, the Court must point out that it is not being asked to determine what standard must be followed in an administrative proceeding such as this, but rather whether the proof must be such as to satisfy the rea-

sonable doubt standard. As the Supreme Court has stated:

> It is of course within the power of the state to regulate procedures under which its laws are carried out, including . . . the burden of persuasion, "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523, 78 S.Ct. 1332, 1341 (1958).

While, as plaintiff points out, there may be an "interest of transcending value" involved here, the Court cannot say that the reasonable doubt test as applied to non-criminal matters is "rooted in the traditions and conscience of our people."

The plaintiff erroneously relies upon the case of *United States v. Costanzo*, 395 F.2d 441 (4th Cir. 1968) as authority for his contention that proof before the Board must be beyond a reasonable doubt. That case, extending the reasonable doubt test to federal juvenile proceedings, specifically held that "a federal juvenile proceeding which may lead to institutional commitment must be regarded as *criminal*." *United States v. Costanzo*, *supra* at 444. [Emphasis supplied.] Accordingly, it is apparent that the Board was not required to use the "beyond a reasonable doubt" standard.

Turning to the second question, involving the charge of an unconstitutional mixing of functions, the facts here show an extreme example of the complaint of mixing. The adjudicator of fact, first, authorized an investigation, second, was kept well apprised of the facts as they developed, and finally, authorized the filing of the charges.

In addition, at the hearing which was to be adversary in nature, the attorney, Mr. Raandle, wore two hats: that of legal advisor to the supposedly impartial adjudicators of fact, as

well as that of advocate for the prosecution. Prior to the proceedings, as well as at one point during the proceedings, the Board in effect delegated to the prosecutor the function of making the decisions on motions made by plaintiff's counsel. Furthermore, it is tacitly admitted that as to certain objections to questions propounded by Mr. Randle, the Board's legal advisor and prosecutor, he (Mr. Randle) in effect made the ruling.

Thus, we have the anomalous situation of Mr. Randle asking a question, plaintiff's counsel objecting, whereupon the Board turned to Mr. Randle for advice as to whether his question was objectionable, and of course, when he said that it was not, the objection was overruled. Likewise, at the times when the Board went into executive session, once to consider admission of exhibits, and once to make a final decision, the Executive Secretary, who swore to the accusation and acted as a liaison between the Board and the investigations, as well as the prosecution, were present.

Translating the proceedings into criminal procedural terms, we have here a dentist of twenty years' practice, who has permanently lost the privilege to practice his profession, as the result of pre-trial proceedings and final hearing where the petit jury was made up of the same members as the grand jury; where the prosecuting attorney acted in some respects as the judge; where the foreman of the grand jury and the chief investigator for the state (Dr. Denton) sat with the jury; and finally, when the jury retired to deliberate, they did so in the presence of the prosecuting attorney and the so-called chief investigator, Dr. Denton. Were this a criminal trial being discussed, it could only be characterized as foreign to our notions of fairness and justice and somewhat reminiscent of the Star Chamber proceedings which have hopefully been relegated to history.

The contention by the Board here is that while these procedures would not pass muster in a criminal trial setting, they are perfectly all right where all the defendant has to lose is his privilege to practice a profession in which he has been engaged for over twenty years. However, we think that *In re: Ruffalo*, ... U.S. ....., 88 S.Ct. 1222 (1968), teaches otherwise. That case, which involved the procedure followed in disbarment of a lawyer, held that these proceedings are adversary and of a quasi-criminal nature. Although *In re: Ruffalo, supra*, dealt with notice as an element of due process, the mixing of functions and appearance of unfairness such as we have here have not been beyond the condemnation of other courts. *American Cyanamid Co. v. Federal Trade Comm.*, 363 F.2d 757 (6th Cir. 1966), and *Amos Treat & Co., Inc. v. Securities and Exchange Comm.*, 306 F.2d 260 (D.C. Cir. 1962), as well as state courts, *Glass v. Mackie*, 370 Mich. 482, 122 N.W.2d 651 (1963).

Accordingly, it is apparent that the following actions of the Board, taken together, deprived the plaintiff of the fundamental fairness required by the Constitution:

1. The adjudicator of fact being kept apprised of the facts of the investigation prior to the hearing.

2. The adjudicator of fact having the authority to authorize the filing of an accusation.

3. The legal advisor to the adjudicator of fact making decisions for the Board and also acting as prosecuting attorney.

4. The prosecuting attorney being present during deliberative sessions where defense counsel was not accorded the same right.

5. The Executive Secretary, who had charge of the in-

vestigation, being present during deliberative sessions of the adjudicator of fact.

While the requested relief of the plaintiff was restoration to his pre-hearing status, the Court is of the opinion that all he is entitled to is a new hearing with the procedures here condemned eliminated. This may be done by appointment of an independent special master or hearing officer for the purpose of taking testimony and making findings, or it may be done by such other procedures as may be devised so as to assure that fundamental fairness required by the United States Constitution and which was so noticeably lacking in the proceedings heretofore conducted by the Board.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter and the parties of this action.

2. The Board was not required to use the "beyond a reasonable doubt" standard in judging whether the accused, the plaintiff here, was guilty of the charges made against him, and the plaintiff was not deprived of due process of law under the Fourteenth Amendment to the United States Constitution by reason thereof.

3. The mixing of functions by the Board, as outlined in the Findings of Fact, deprived the plaintiff of procedural due process of law contrary to the provisions of the due process clause of the Fourteenth Amendment to the United States Constitution.

FINAL JUDGMENT

Accordingly, it is ORDERED and ADJUDGED that:

1. The order of revocation of license of plaintiff, Dr. Roy

F. Mack, to practice dentistry in the State of Florida, issued by defendant, The Florida State Board of Dentistry, and effective April 1, 1966, be and the same is hereby declared null and void.

II. Defendant, The Florida State Board of Dentistry, is ordered and directed to provide plaintiff, Dr. Roy F. Mack, a new hearing in accordance with the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution, on the charges heretofore brought against him, within 120 days from the date hereof, or on failure to do so to issue to Dr. Roy F. Mack, upon application, the necessary license and renewals thereof to practice dentistry in the State of Florida.

III. Plaintiff shall recover from defendant his costs incurred in and about this action, to be later taxed.

DONE and ORDERED at Miami, Florida, this 20th day of March, 1969.

/s/ Ted Cabot
UNITED STATES DISTRICT JUDGE

Copies to counsel (2).

ROY F. MACK,

Petitioner,

vs.

J. M. PEPPER, as Chairman, ROBERT THOBURN, as Vice-Chairman, F. A. FINLEY, as Secretary-Treasurer, F. F. FARVER, RUPERT H. GILLESPIE, M. ERVIN WAHNISH and CHARLES J. HESTER, as members of the Florida State Board of Dental Examiners,

Respondents.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1966

CASE NO. 66--280

Opinion filed November 15, 1966.

On Petition for Writ of Certiorari to the Florida State Board of Dental Examiners.

Marchant, Perkins & Cook,for petitioner.

Robinson & Randle, for respondents.

192 So.2d 66

Before PEARSON, BARKDULL and SWANN, JJ.

PER CURIAM.

Petitioner, Roy F. Mack, seeks review, by writ of certiorari, of an order of the Florida State Board of Dental Examiners which revoked his license to practice dentistry. The Board found the petitioner guilty of three separate charges; they are: (1) he caused to be listed in the yellow pages of the Greater Miami Telephone Directory a listing for Palm Springs General Hospital with his private number; (2) he advertised professional services at a greatly reduced cost to certain members of trade unions; (3) misconduct in his business which would bring discredit upon the dental profession.

In his brief, petitioner has presented two points. The first point urges that the procedure before the Dental Board was such that he was deprived of a fair and impartial trial. The second point urges that the Board's findings are not supported by substantial competent evidence. We have reviewed the record in the light of these charges, and we find that the first point is without merit. See State v. Whitman, 116 Fla. 196, 156 So. 705, 93 A.L.R. 1416 (1934); Florida Board of Pharmacy v. Levin, Fla. 1966, ... So.2d ..... [filed October 12, 1966]. The second point is also without merit. A review of the record reveals evidence to support the finding of the Board under the rules laid down in DeGroot v. Sheffield, Fla. 1957, 95 So.2d 912 and Florida State Board of Dental Examiners v. Feinglass, Fla.App. 1964, 166 So.2d 686.

We find particularly apropos to the review of this record the opinion in Florida Board of Pharmacy v. Levin, supra, wherein the Supreme Court set forth a caution upon the review of orders of State professional boards. The Court stated:

> "It is true some odium attaches to the method employed by some licensing boards in apprehending violators through the use of agents who make purchases

and procure deliveries to themselves of unprescribed or restricted items. Nevertheless, due to the difficulties involved in regulating certain professions, such procedures have been found to be necessary and appropriate to properly administer the regulatory laws in the interest of the health and welfare of the general public. See Mitchell v. Gillespie, 164 So.2d 867, affirmed 172 So.2d 820; Florida Board of Pharmacy v. Hall, 157 So.2d 824; and Carter v. State, 155 So.2d 787.

"It is apparent that because of the particular issues in the hearing, the members of the Board of Pharmacy, who are all pharmacists (see Sec. 465.041, F.S.), were in all probability better qualified than others not members of the profession, to determine whether their fellow-professional Levin's action and conduct in the premises measured up to the recognized standards and regulations of the pharmaceutical profession."

Having heard argument and upon reviewing the record, we have determined that the petition for writ of certiorari should be and the same is hereby discharged.

It is so ordered.